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The phrase "patent troll" has been an Internet buzzword for almost a decade but the search for and implementation of effective tools to curb patent trolling is undoubtedly an ongoing endeavor. This blog post surveys current efforts to restrain patent trolling by the courts, lawmakers, and regulators.

First, some background: patent trolls—or the more polite "patent assertion entities" (PAEs)—use patents as legal weapons for economic extortion. A patent troll's business model includes acquiring patents, often from bankrupt firms, that are overly broad or vague so that they can be interpreted to cover commonly used technologies. Instead of creating economic value by manufacturing products or providing services, PAEs exist only to enforce patent rights against accused infringers in an attempt to collect licensing fees. What ultimately enables this business model is the fact that patent litigation is extremely costly. Plaintiffs can rack up millions of dollars in discovery costs alone even if their claims later turn out to be frivolous. This incentivizes the alleged infringers to pay patent trolls for a license or settle before litigation gets too costly.

So pervasive are these patent trolls that they have even gripped the attention of popular media. In 2011 the popular podcast *This American Life* dedicated an episode to a discussion of patent trolling with a focus on the District Court for the Eastern District of Texas, where lawyers and plaintiff-friendly juries have built a cottage industry based around multimillion-dollar verdicts. On February 25, 2015, a jury for the same court ruled that Apple must pay a patent-troll plaintiff $532 million.

Until this month, the ubiquitous online shopping-cart technology was not only patented but also used against e-commerce businesses for a quick payday. Soverain Software is a PAE and the holder of the online "shopping cart" patents. In year 2012 alone, Soverain filed 13 lawsuits against major e-commerce retailers, including Office Depot, J. Crew, Bloomingdales, and Nordstrom. However, a recent Federal Circuit case reaffirmed its previous invalidation of the virtual shopping cart patents, putting a halt to Soverain's trolling scheme.

On February 12, 2015, the U.S. Court of Appeals for the Federal Circuit overturned Soverain's trial win in—surprise—the Eastern District of Texas. *Soverain Software v. Victoria's Secret Direct Brand Management* was an appeal by Victoria's Secret and Avon after a jury verdict against them for infringement back in November 2011. The retailers had been ordered to pay Soverain almost $18 million and a "running royalty" of about 1 percent. Subsequent to the

filing of the appeal, on January 22, 2013, the Federal Circuit decided *Soverain v. Newegg* in which Soverain's shopping cart patents were invalidated on the grounds of obviousness.

In order to avert issue preclusion, Soverain argued in the recent appeal by Victoria's Secret and Avon that it did not have a full and fair opportunity to litigate the issue of obviousness in the *Newegg* case. However, Federal Circuit's Judge Dyk nevertheless ruled that Soverain is collaterally estopped from suing on patent claims earlier invalidated in *Newegg*. Soverain's second loss in this court is important because it will likely halt all of Soverain's outstanding lawsuits against numerous retailers based on the same patents.

Meanwhile, legislative efforts to curtail lawsuits by patent trolls are also underway. In February 2015, House Judiciary Chairman Robert W. Goodlatte, along with a bipartisan group of colleagues, reintroduced a House bill that would make it more difficult, and potentially costly, for patent holders to sue others for infringement.

The bill—the Innovation Act—will require plaintiffs to disclose who the owner of a patent is *before* litigation, as well as requiring them in the pleading stage to explain why they are suing a company. By necessitating disclosure of more information, the Act helps to make the patent litigation process more transparent, which in turn prevents invalid patents from being used to extort money from retailers and end users. In addition, judges are required to award attorneys' fees to the victims of the frivolous lawsuit under the Act if the plaintiff's claims have no reasonable basis in law and fact.

The 2015 bill is Congress' third attempt to reform the patent system. In 2011 Congress passed a reform law known as the America Invents Act but it had virtually no effect due to the lobbying efforts by patent holders. By the time President Obama signed it into law, almost every key provision had been gutted.

Congress' second attempt at meaningful reform came in 2014 with the introduction of the Innovation Act. The bill passed the House of Representatives by a large margin, with bipartisan support from influential Senators, as well as President Obama. However, Senator Patrick Leahy (D-Vt) abruptly cancelled a key vote last spring and the bill never came to fruition.

This makes Chairman Goodlatte's reintroduction of the Innovation Act the third legislative attempt to curb patent trolls. Patent reform proponents are optimistic that the bill will finally pass this year. One key difference this time from 2014's hiccup is that it will be harder for other Senate Democrats to throw wrenches in the process due to the fact that the Republicans now comprise the majority.

In the regulatory arena, the Federal Trade Commission is also preparing a study of PAEs. FTC Commissioner Julie Brill said the nonenforcement-minded review is gathering empirical

evidence about what PAEs do and what, if any, effects they have on competition. The probe is scheduled to be completed by the end of 2015. Brill further stated that FTC's study shouldn't slow legislative reforms and urged lawmakers and enforcers to take prompt action to improve the patent system.